



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of George Mockry et al
Serial No. 09/878,860
Group Art Unit 3711
Filed May 10, 2002
For: Method of Recording and Playing Baseball Game Showing Each Batter's Last Pitch

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Kenton L. Freudenberg (Reg. No. 32732)
Name of Applicant, Assignee or Registered Representative

Kenton L. Freudenberg
Signature
16 January 2007
Date

AMENDED APPEAL BRIEF

In response to the Notification of Non-Compliant Appeal Brief dated November 14, 2006, Applicants submit this Amended Appeal Brief.

1. Real party in interest.

This appeal is brought by the applicants in the above identified application:

George Michael Mockry
13567 Road 28
Dolores, Colorado 81323

Greg Mockry
185 Cook Street
Massena, New York 13662

2. Related appeals and interferences.

There are no related appeals or interferences.

3. Status of claims.

Claims 23-40 are pending. All claims presently stand rejected.

4. Status of amendments.

No amendments have been filed subsequent to final rejection.

5. Summary of claimed subject matter.

The essential subject matter claimed is a method of editing a recorded baseball game to provide a shortened game for viewing, the method comprising the retention of only the last pitch to each batter for each "at bat." The novel concept of the present invention is summarized as follows at Page 1, Paragraph 4, Line 21 (not numbered) of the specification as filed, which corresponds to Paragraph 4 of the published application (Publication # 20030060311):

*[0004] In accordance with an aspect of this invention, a film or video record is made of each player's turn at bat. The video record, which can be film, digital, or tape, **is edited down to retain the last pitch thrown to each player, plus any resulting action for that pitch.** This would record each safe base hit, each walk, strike out, sacrifice fly, ground out, etc. Of course, fielding would be recorded, i.e., each put-out, error, double-play, and throw-out. The resulting video record would be about 10 to 15 minutes, showing all the action of the game. [Emphasis added]*

Claim 23 is directed to a creating video presentation according to the basic method.

Claim 24 is directed to a providing a subscription service using recordings prepared in accordance with the basic method.

Claim 35 is directed to a providing a broadcast for a fee of a recording prepared in accordance with the basic method.

Claim 38 is directed to a providing a subscription for a fee of a recording prepared in accordance with the basic method.

6. Grounds of rejection to be reviewed on appeal.

Claims 23-25,28-30,33-35, 37, 38 and 40 are rejected under 35 U.S.C. 102(b) as anticipated by or in the alternative under 35 U.S.C. §103 as obvious over "ProQuest Producing Sports Channel."

Claims 27,32,36 and 39 are rejected under 35 U.S.C. 103 as obvious over "ProQuest Producing Sports Channel" and further in view of "MediaChannel."

ARGUMENT

35 U.S.C. 102(b)

7. Claims 23-25,28-30,33-35, 37, 38 and 40 are rejected as anticipated under 35 U.S.C. 102(b) by the "ProQuest Producing Sports Channel" reference ("ProQuest"), which is attached hereto and is a republication of an article from the San Francisco Chronicle Newspaper. "ProQuest" neither suggests nor describes the novel method claimed by applicants of retaining only the last pitch to each batter.

35 U.S.C. §103

8. All claims stand rejected in whole or in part under 35 U.S.C. 103 as obvious over “ProQuest Producing Sports Channel.”

At the root of this appeal is the examiner’s improper conclusory assumption (See In re Kahn, 441 F.3d 977, 78 U.S.P.Q.2d 1329 (Fed. Cir. 2006)) that the present invention as claimed is nothing more than an edited baseball game. To the contrary, The present invention provides a specific and consistent method or algorithm which can be applied to the editing of a baseball game to achieve the benefit of allowing essentially all the action of a game to be viewed in a much shorter period of time to address the issue that a full baseball game typically takes a long period of time to complete. The essence of that method, as described and claimed, is in its simplest terms, to show the last pitch to each batter. In other words, every batter is shown for every at “bat ,” but only one pitch to each batter is retained in the edited game, namely the last pitch to each such batter. While the concept is ultimately relatively simple, there is no suggestion in any of the prior art of record of the use of such a method.

“It does not matter, however, what motivated an inventor to discover the claimed subject matter. The discovery may be by design, by accident, by a vision in a dream, by a sudden flash of genius, or by any other conceivable means. “Patentability shall not be negated by the manner in which the invention was made.” 35 U.S.C. § 103 (1988). The relevant consideration is the problem the patent applicant purports to have solved, regardless of the technique employed to achieve that solution.” Oscar Mayer Foods Corp. v. ConAgra, Inc., 45 F.3d 443 (Fed. Cir. 1994)

9. The Examiner argues (page 3) that “no criticality is seen in the duration of the edited recording.” The examiner ignores that the nature of the invention is to condense the essential action of an entire baseball game into the described period of time. The examiner has cited no prior art which suggests the method claimed by the applicant in the present case. The examiner has also erroneously concluded that showing highlights of a game is equivalent to showing essentially the entire game in a condensed format.

10. The examiner accurately states (page 2) that “ProQuest discloses an edited recording.” However, that is all that is disclosed in the ProQuest reference. There is no suggestion that ProQuest describes any method of editing a baseball game or that ProQuest suggests any means by which essentially all of the action of a game can be condensed into a time frame such as that described for the present invention. At best, the description in the Proquest reference suggests only an edited game lasting twenty-two minutes, or as much as 2 times the length of a game edited according to the present invention.

11. The examiner argues (page2) that “it would have been obvious to one of ordinary skill in the art at the time of the invention to have edited the video to reflect what the editor wished to record based on personal preferences and time available.” The examiner provides no support whatsoever to establish that such “personal preferences” would be known to include “only the last pitch to each batter” or that such an editing process could achieve the results of the applicant’s invention. The examiner has not met his burden “[t]o reject claims in an application under section 103, an examiner must show an un rebutted prima facie case of obviousness” In re Kahn, supra.

12. In his office action of June 28, 2005 the examiner ignores secondary evidence of non-obviousness by stating (page 9):

“With regard to the statement that ‘even the MLB’ declares that this is a revolutionary new process: use of hyperbole is well-known in the advertising art. The mere comment made an advertising promotion does not inherently created factual statement.”

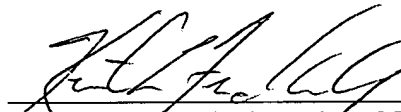
Whether an advertising statement made by MLB is hyperbole or not is irrelevant, but in any case the examiner is in no position to make such conclusion. What is relevant and undeniable is the fact that MLB is using the method of the present invention and that use is an indicator of “commercial success” appropriately taken into account as a secondary factor of non-obviousness under the standards of Graham v. John Deere Co., 383 U.S. 1, 13-14 (1966).

13. As the Court of Appeals for the Federal Circuit has succinctly stated:

... ***the rule is that the burden of persuasion is on the PTO to show why the applicant is not entitled to a patent.*** *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992) (Plager, J., Concurring); *In re Warner*, 54 C.C.P.A. 1628, 379 F.2d 1011, 1016, 154 USPQ 173, 177 (CCPA 1967), cert denied, 389 U.S. 1057, 19 L. Ed. 2d 857, 88 S. Ct. 811 (1968); see also *In re Caveney*, 761 F.2d 671, 674, 226 USPQ 1, 3 (Fed. Cir. 1985) (“Preponderance of the evidence is the standard that must be met by the PTO in making rejections.”) *In re Epstein*, 32 F.3d 1559 (Fed. Cir. 08/17/1994)

As set forth above, the examiner has not provided any prior art sufficient to meet this burden. Accordingly, the Applicants herein are entitled to have a patent granted.

Respectfully submitted this 16th day of January, 2007.



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Claims Appendix

This listing of claims replaces all prior versions and listings, of claims in the application

Claims 1-22 (cancelled)

Claim 23 (Previously Presented). A method of replaying or rebroadcasting a baseball game for which a video recording of the baseball game was produced containing substantially every pitch thrown to every batter from a first pitch to a final pitch and game action resulting from every pitch, together with other action occurring during each appearance by every batter, the method comprising (a) editing the video recording to produce an edited recording, the edited recording having video consisting essentially of (i) the final pitch thrown to every batter and any game action resulting from the final pitch, (ii) successful attempts of runners on base to advance to another base not associated with the game action resulting from the final pitch and (iii) unsuccessful attempts of the runners on base to advance to another base resulting in an out not associated with the game action resulting from the final pitch; (b) obtaining subscribers for viewing the edited recording and (c) playing or broadcasting the edited recording for viewing by the subscribers.

Claim 24 (Previously Presented). A method of providing a subscription for viewing a recorded baseball game in which players from each team appear at bat, and attempt to place a pitched baseball into play and to reach base safely; with players failing to reach base safely being out and players on base attempting unsuccessfully to advance to another base being out; the method comprising: (1) recording each appearance-at-bat for every player and game action resulting from an appearance-at-bat to produce a game recording; (2) editing the game recording of each appearance-at-bat to produce an edited recording by deleting substantially all game action other than (i) game action from a final pitch thrown to each player, (ii) successful attempts of runners on base to advance to another base not associated with the game action resulting from the final pitch and (iii) unsuccessful attempts of the runners on base to advance to another base resulting

in an out not associated with the game action resulting from the final pitch; (3) obtaining subscribers for viewing the edited recording and (4) playing or broadcasting the edited recording as a condensed recorded game for viewing by the subscribers.

Claim 25 (Previously Presented) The method of claim 23 wherein the edited recording for a nine-inning baseball game is about 15 minutes.

Claim 26. (Canceled)

Claim 27. (Previously Presented) The method of claim 23 wherein said step of playing or broadcasting the edited recording for viewing is conducted over the Internet.

Claim 28. (Previously Presented) The method of claim 23 wherein said step of playing or broadcasting the edited recording for viewing is conducted by playing a videotape recording.

Claim 29. (Previously Presented) The method of claim 23 wherein the edited recording contains audio explaining any substitution of players.

Claim 30 (Previously Presented) The method of claim 24 wherein the edited recording for a nine-inning baseball game is about 15 minutes.

Claim 31. (Canceled)

Claim 32. (Previously Presented) The method of claim 24 wherein said step of playing or broadcasting the edited recording for viewing is conducted over the Internet.

Claim 33. (Previously Presented) The method of claim 24 wherein said step of playing or

broadcasting the edited recording for viewing is conducted by playing a videotape recording.

Claim 34. (Previously Presented) The method of claim 24 wherein the edited recording contains audio explaining any substitution of players.

Claim 35 (Previously Presented). A method of obtaining revenue by replaying or rebroadcasting a condensed baseball game, for which a video recording of the baseball game was produced containing substantially every pitch thrown to every batter from a first pitch to a final pitch and game action resulting from every pitch, together with other action occurring during each appearance by every batter, the method comprising (a) editing the video recording to produce an edited recording, the edited recording having video consisting essentially of (i) the final pitch thrown to every batter and any game action resulting from the final pitch, (ii) successful attempts of runners on base to advance to another base not associated with the game action resulting from the final pitch and (iii) unsuccessful attempts of the runners on base to advance to another base resulting in an out not associated with the game action resulting from the final pitch; (b) offering the edited recording to potential subscribers for viewing and (c) playing or broadcasting the edited recording for viewing by the subscribers for monetary consideration.

Claim 36. (Previously Presented) The method of claim 35 wherein said step of playing or broadcasting the edited recording for viewing is conducted over the Internet.

Claim 37. (Previously Presented) The method of claim 35 wherein the edited recording

contains audio explaining any substitution of players.

Claim 38 (Previously Presented). A method of obtaining revenue from editing a recorded baseball game in which players from each team appear at bat, and attempt to place a pitched baseball into play and to reach base safely; with players failing to reach base safely being out and players on base attempting unsuccessfully to advance to another base being out; the method comprising: (1) recording each appearance-at-bat for every player and game action resulting from an appearance-at-bat to produce a game recording; (2) editing the game recording of each appearance-at-bat to produce an edited recording which consists essentially of (i) game action from a final pitch thrown to each player, (ii) successful attempts of runners on base to advance to another base not associated with the game action resulting from the final pitch and (iii) unsuccessful attempts of the runners on base to advance to another base resulting in an out not associated with the game action resulting from the final pitch; (3) offering the edited recording to potential subscribers for viewing and (4) playing or broadcasting the edited recording for viewing by the subscribers for monetary consideration.

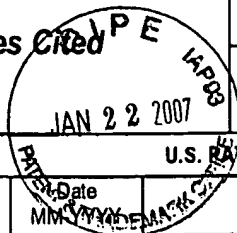
Claim 39. (Previously Presented) The method of claim 38 wherein said step of playing or broadcasting the edited recording for viewing is conducted over the Internet.

Claim 40. (Previously Presented) The method of claim 38 wherein the edited recording contains audio explaining any substitution of players.

Evidence Appendix

The attached article is a copy of the “ProQuest Producing Sports Channel” evidence entered by the examiner in an office action dated October 25, 2005.

Notice of References Cited



Application/Control No. 09/878,860		Applicant(s)/Patent Under Reexamination MOCKRY ET AL.	
Examiner Mike Chambers		Art Unit 3711	Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
	A	US-			
	B	US-			
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NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages)
	U	Web page downloaded on 10/20/05, ProQuest-Producing SportChannel, 7/18/97, www.proquest.umi.com, 3 pages
	V	Web page downloaded on 10/20/05, ProQuest-Baseball Lite, 7/26/95, www.proquest.umi.com, 1 page
	W	Web page downloaded on 10/20/05, ProQuest-Watching in Fast Forward, 5/5/2002, www.proquest.umi.com, 1 page
	X	Web page downloaded on 10/20/05, The Media Channell, 1998, www.web.archive.org/mediachannel.com, 6 pages

*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
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San Francisco Chronicle

Producing SportsChannel 'Light' Is Heavy Duty: [FINAL Edition]

SUSAN SLUSHER San Francisco Chronicle San Francisco, Calif. Jul 18, 1997 pg. B.3

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Copyright Chronicle Publishing Company Jul 18, 1997

A LIVE TELEVISION broadcast can be a hectic endeavor. But it's simple compared to some SportsChannel "Light" productions.

The highlight shows, which condense A's and Giants' games into just a half-hour, are put together on the fly -- while the actual game is still in progress. Or more harrowing, while the "Light" program is already rolling. Most Glen Kuiper and his crew are often editing the final segment of the show as the first segment is on the air.

"Once we were still working on the third segment, and during the break between the second and third segments, the engineer came in and said, 'I need that tape NOW,'" Kuiper said, chuckling.

The SportsChannel bunch runs up against severe time problems when they do a "Light" deal after a night game, especially if game time is 7:30 p.m. and the "Light" show is scheduled for 11. But day games, particularly the 13 that aren't broadcast on TV and just have a "Light" version, pose different problems. Because the video feed comes off either Diamond Vision or JumboTron cameras, the "Light" staff is responsible for adding all the graphics; in addition, they can't necessarily expect they'll get camera angles they like or replays they want.

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"You get a feel for the teams — and we know the A's give up a lot late, so you have to leave room for that," Kuiper said. "Sometimes we just have to go with whatever we have, but if there's a late comeback, it makes the whole show."

"When it first started, we had no idea how to do it," said Meyers, who is SportsChannel's vice president of programming. "We didn't even know if we could get it done in the time we had to do it. Having it on at 11 was really scary."

SportsChannel Lineup changes the A's and Dbacks tonight at 11 p.m., and the Giants at 8:30 p.m. tomorrow. A total of 110 games get the light treatment this season. The program is getting good ratings, especially for games that don't have actual TV broadcasts. SportsChannel has been drawing about a 2.0 rating, especially for the Giants.

Overall, baseball ratings have skyrocketed for SportsChannel since moving from premium cable to expanded basic at the start of June. A's ratings are up 132 percent, and Giants ratings are up 152 percent.

THE TICKET UNDER WAY: The new station is now, "The Ticket" (1060 AM), h/t the air loudly and obnoxiously on Tuesday and is already making clear its sports station KHSR took like NPR. More on that next week, after The Ticket has more time to get established; meanwhile, some program notes:

- Sunday Night Baseball moves from KNBR (330 AM) to The Ticket; this week, the Yankees play at Milwaukee at 4:45 p.m. The Ticket also has the Cleveland Star at Cleveland at 8:52 a.m. tomorrow

.. The Ticket will carry Notre Dame football this fall, including the October 4 game at ~~DePaul~~

- On Tuesday, KNBR dropped "The Sports Babe" from its late-night lineup. Program director Bob Agnew said the decision was made because The Ticket is running all its nationally syndicated programs live, so KNBR is following suit. Agnew said that "The Babe" is live from 7-10 a.m. - which conflicts with KNBR's own a.m. Russ Lindebaugh

- The spring ratings book brought good news to KNBR, according to Agnew. Thanks in large part to the first-place Colts, the station moved from ninth overall to third for second with KCBS and behind KGO, with a 4.3 rating. Agnew said. He also reports that the station is No. 1 with men aged 25-54, with a 7.3 rating, up from a 6.6 in the winter book.

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ON THE AIR -- Producing SportsChannel 'Light' Is Heavy Duty

SUSAN GLUSSER

Friday, July 18, 1997

A LIVE TELEVISION broadcast can be a hectic endeavor. But it's simple compared to some SportsChannel "Light" productions.

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"Once, we were still working on the third segment, and during the break between the second and third segments, the engineer came in and said, 'I need that tape NOW,'" Kuiper said, chuckling.

The SportsChannel bunch runs up against severe time problems when they do a "Light" cast after a night game, especially if game time is 7:30 p.m. and the "Light" show is scheduled for 11. But day games, particularly the 13 that aren't broadcast on TV and just have a "Light" version, pose different problems. Because the video feed comes off either Diamond Vision or JumboTron cameras, the "Light" staff is responsible for adding all the graphics; in addition, they can't necessarily expect they'll get camera angles they like or replays they want.

Then there are walks, the bane of SportsChannel Light's existence. The gist of the program is to give a real flavor of the game, with as much of the pertinent action as possible. Walks cut into the program's 22 minutes, and, well, aren't very exciting. A dull ninth inning is also a downer; the third segment is usually reserved in case there's a rally or the dreaded extra innings; if nothing happens, tough.

"You get a feel for the teams — and we know the A's give up a lot late, so you have to leave room for that," Kuiper said. "Sometimes we just have to fill in with whatever we have, but if there's a late comeback, it makes the whole show."

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ON THE AIR -- Producing SportsChannel 'Light' Is Heavy Duty

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SportsChannel Pacific was the first outlet in the country to run an abbreviated baseball game; SportsChannel New York now has a version, thanks to Mark Shuken, who originated the idea with SportsChannel's Larry Meyers before moving to New York.

"When it first started, we had no idea how to do it," said Meyers, who is SportsChannel's vice president of programming. "We didn't even know if we could get it done in the time we had to do it. Having it on at 11 was really scary."

Despite the time crunch, the atmosphere is as light as the show's name during the six-person production process -- the tape machines are named "Lucy" and "Ricky," Chinese food is ordered, people rush in and out to feed parking meters and on-line editor John Schainker changes his hair color every few weeks; it's currently Cheetos orange.

SportsChannel Light features the A's and Twins tonight at 11 p.m., and the Giants at St. Louis at 11 p.m. tomorrow. In all, a total of 110 games get the Light treatment this season. The program is getting good ratings, especially for games that don't have actual TV broadcasts; SportsChannel has been drawing about a 1.0 rating, particularly for the Giants.

Overall, baseball ratings have skyrocketed for SportsChannel since moving from premium cable to expanded basic at the start of June. A's ratings are up 133 percent, and Giants' ratings are up 182 percent.

THE TICKET UNDER WAY: The new station in town, "The Ticket" (1050 AM), hit the air loudly and obnoxiously on Tuesday and is already making sister all-sports station KNBR look like NPR. More on that next week, after The Ticket has more time to get established; meanwhile, some program notes:

-- Sunday Night Baseball moves from KNBR (680 AM) to The Ticket; this week, the Yankees play at Milwaukee at 4:45 p.m. The Ticket also has the Red Sox at Cleveland at 9:50 a.m. tomorrow.

-- The Ticket will carry Notre Dame football this fall, including the October 4 game at Stanford.

-- On Tuesday, KNBR dropped "The Sports Babe" from its late-night lineup. Program director Bob Agnew said the decision was made because The Ticket is running all its nationally syndicated programs live, so KNBR is following suit. Agnew said that "The Babe" is live from 7-10 a.m. -- which conflicts with KNBR's cash cow, Rush Limbaugh.

-- The spring ratings book brought good news to KNBR, according to Agnew. Thanks in large part to the first-place Giants, the station moved from ninth overall to tied for second with KCBS and behind KGO, with a 4.3 rating, Agnew said. He also reports that the station is No. 1 with men aged 25-54, with a 7.3 rating, up from a 5.8 in the winter book.

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